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MSPB Reversed, Yet Again: USERRA provides an absolute right to a hearing.

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CATEGORY: Enforcement

The U.S. Court of Appeals for the Federal Circuit on March 7 rendered a decision in *Kirkendall v. Department of the Army* 479 F.3d 830 (Fed. Cir. 2007), holding that the Uniformed Services Employment and Reemployment Rights Act (USERRA) requires the Merit Systems Protection Board (MSPB) to hold a hearing when a federal employee or an applicant for a federal position claims a violation of USERRA. In addition, the court ruled on issues pertaining to the Veterans' Employment Opportunities Act (VEOA).

USERRA cases against federal agencies, as employers, are adjudicated by the MSPB, a quasi-judicial federal agency, and the U.S. Court of Appeals for the Federal Circuit hears appeals from final MSPB decisions. See Law Review 189 (www.roa.org/law_reviews) which said the Federal Circuit "is not shy about reversing the MSPB in reemployment cases," and Law Review 0722 described just such an instance involving a USERRA case.

Kirkendall is another significant reversal. With regard to USERRA, the Court held: "Until now, it has been the Board's practice to grant hearings as a matter of administrative grace, or deny one at its convenience.... But it must administer the law as Congress wrote it. The Board's consistent misapplication of the law can neither be used to defend its practice; nor to justify what Congress did not intend."

In 1998, John Kirkendall, a 100 percent disabled veteran, applied for a position as a supervisory equipment specialist with the Army at Fort Bragg, N.C. In early 2000, the Army found that Mr. Kirkendall's application lacked sufficient detail on his experience and rated him ineligible for the position. Mr. Kirkendall filed several complaints contesting the Army's decision not to hire him, and on June 13, 2002, he filed appeals with the MSPB pursuant to USERRA and the VEOA. With regard to the USERRA appeal, the MSPB administrative judge found no cognizable claim because Mr. Kirkendall failed to allege he was denied a benefit of employment on the basis of his prior performance of military duty. Mr. Kirkendall had requested a hearing, but the judge denied it.

Mr. Kirkendall filed a petition for review of the administrative judge's decision to the full MSPB. The board found merit in Mr. Kirkendall's petition and remanded the USERRA claim back to the administrative judge for further proceedings. The board held that Mr. Kirkendall's repeated assertions that he was not selected for the position because of his status as a disabled veteran amounted to a cognizable claim under USERRA.

On remand, the administrative judge held, without a hearing, that Mr. Kirkendall offered no proof that his veteran status was a substantial or motivating factor in his non-selection. Mr. Kirkendall again appealed, and this time the whole MSPB agreed with the administrative judge's decision on Oct. 13, 2004.

Mr. Kirkendall then filed an appeal to the Federal Circuit. On June 22, 2005, a three-judge panel of the Federal Circuit reversed the MSPB's decision and held that hearings are required when people allege violations of USERRA. The government filed a petition for rehearing, which was granted on Jan. 2, 2006, and the court also vacated the June 22, 2005, decision pending a final decision by the full court. The full decision reasserting the three-judge panel's position was published on March 7.

The Federal Circuit's holding will now allow people who allege violations of USERRA to call witnesses and cross-examine witnesses at a hearing in an effort to establish their claims. This will provide many litigants an advantage compared with prior MSPB holdings that permitted an administrative law judge to summarily dismiss appeals at an early stage in the litigation.

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